UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

MURTIS TAYLOR HUMAN) CASES 08-CA-061918
SERVICES SYSTEMS,) 08-CA-066225
and) 08-CA-080403
ALTON HILL) 08-CA-086181
	08-CA-087325
MURTIS TAYLOR HUMAN)
SERVICES SYSTEMS,)
and	
SERVICE EMPLOYEES) BRIEF IN SUPPORT OF
INTERNATIONAL UNION) <u>RESPONDENT'S EXCEPTIONS</u>
DISTRICT 199, WV/KY/OH, THE)
HEALTHCARE AND SOCIAL)
SERVICES UNION)
)
MURTIS TAYLOR HUMAN)
SERVICES SYSTEMS,)
and)
CLOVER ENGLISH, III)

I. STATEMENT OF THE CASE

Respondent Murtis Taylor Human Services Systems ("Murtis Taylor") is a charitable organization located in Cleveland, Ohio that provides community health, childcare, senior services and other community outreach programs. (Tr. 37-38) Some of Murtis Taylor's employees are represented by Service Employees International Union District 1199, WV/KY/OH, ("the Union"). Alton Hill is an employee of Murtis Taylor and also serves as a Union representative. (Tr. 295-296) Clover English was employed at Murtis Taylor from 2010 until March 2012. (Tr. 146) The major focus of the case presented to the Administrative Law Judge concerned Murtis Taylor's dealing with Alton Hill and Clover English.

A. Alton Hill Disrupts The Administrative Hearing of Christine Zeh.

Alton Hill acted as a Union representative for Christine Zeh at an administrative hearing conducted by Murtis Taylor on July 22, 2011. Murtis Taylor suspected that Christine Zeh may have been doing work for another employer during the same times she had claimed to be working for Murtis Taylor. Murtis Taylor's Human Resources Director, William Newsome, who conducted the administrative hearing, told Hill that Zeh was being investigated for a conflict of interest and that the first question would be about Zeh's work for Beechbrook, another employer. (Tr. 731-732)

The purpose of administrative hearings is to gather facts. (Tr. 333-334, 725) However, Alton Hill frustrated this purpose by repeatedly instructing Zeh not to answer the questions put to her, including the question about her employment at Beechbrook. (Tr. 339, 657-658, 682-684, 735, 740-741) Deborah Hill, a supervisor at Murtis Taylor, testified that during the Zeh administrative hearing "Nothing was resolved. During that meeting time, Mr. Hill... was really indignant. He was loud. He jumped across in Mr. Newsome's face and basically... was telling Christine she didn't have to answer anything, and he kept on saying are you threatening me, you're threatening me and Mr. Newsome kept telling him it's an administrative hearing." (Tr. 684) Newsome terminated the administrative hearing because Hill's conduct made it pointless to continue. (Tr. 658, 739-741) Zeh subsequently resigned from Murtis Taylor. (Tr. 744)

As a result of Hill's efforts to impede an administrative hearing, Newsome considered recommending that Hill be terminated. (Tr. 749-750) Hill was not terminated, but he was suspended for ten days beginning on August 18, 2011. (R. Exh. 23) Hill identified this

¹ The Administrative Law Judge found that Mr. Newsome had not threatened Hill. (ALJ Dec. at 16)

suspension as the only discipline he received as a result of his conduct during the Zeh hearing. (Tr. 308) Hill later filed an unfair labor practice charge challenging this suspension.

B. Alton Hill Challenges Other Actions Taken By Murtis Taylor.

Hill also charged that various actions taken by Murtis Taylor after his suspension violated the Act. These included an investigation of his work team and a search of his work area, being requested to provide information to substantiate that he had auto insurance and to verify his immigration status, and being denied access to one of Murtis Taylor's facilities on one occasion.

Following the Zeh administrative hearing, Lovell Custard, Murtis Taylor's Chief Executive Officer, also became concerned that Hill may have been attempting to cover up Zeh's actions, which Murtis Taylor believed might constitute Medicaid fraud. (Tr. 532-535) Prior to Hill's actions during Zeh's hearing, no Union representative at Murtis Taylor had ever even attempted to impede an administrative hearing, thus giving additional reason for concern about a coordinated effort. (Tr. 534-535) As a result of this concern, a survey of Alton Hill's work team was conducted to determine if the clients they were serving were satisfied. (Tr. 792-793) Alton Hill testified that Murtis Taylor had the right to investigate for Medicaid fraud. (Tr. 353) In addition, Hill's work area was searched and marked off with yellow tape. The purpose of the search was to see if there were any documents relating to potential Medicaid fraud and the area was taped to prevent the removal of any such documents. (Tr. 545-547, 664-665) All the property searched belonged to Murtis Taylor. (Tr. 348-349, 664) No wrongdoing was uncovered as a result of the investigation or the search and Alton Hill was not disciplined as a result.

Following Hill's return from his ten-day suspension, Hill claimed that he was denied access to one of Murtis Taylor's facilities on one occasion. (Tr. 356) A Murtis Taylor manager complained to Lovell Custard about Hill being at a facility at which Hill did not have any clients. (Tr. 542-543) Murtis Taylor already prohibited employees from going to facilities other than those at which they had clients, although this rule had not always been enforced. (Tr. 542-544) As a result of this complaint, Custard directed that a memorandum be issued reminding employees of this policy. (Tr. 542-544)

On August 2, 2011, Addie Summers sent an email to Hill requesting verification that he had auto insurance. (Tr. 495; R. Exh. 29) Summers had been requesting such information from Murtis Taylor employees on a regular basis since 2007, and she requested similar information from other Murtis Taylor employees both before and after August 2, 2011. (Tr. 496-497) No one directed her to request this information from Hill. (Tr. 498) Murtis Taylor had a policy in effect requiring that employees who drove a vehicle on behalf of clients, such as Hill, have both a valid driver's license and valid automobile insurance. (R. Exh. 12)

On July 18, 2011, Cherese Rias sent an email to Alton Hill requesting that he provide information to verify information related to Form I-9. Rias requested this information from a number of employees, although Hill was the first employee she requested it from. (Tr. 455-459; R. Exh. 28) Rias had started working at Murtis Taylor in June 2011 and wanted to ensure that all file information was up to date. (Tr. 447-449) Rias was also acting under the direction of Jennifer Harden, who wished to conduct an audit of I-9 information as a result of information she received from the Society of Human Resource Management. (Tr. 604-606)

C. Clover English Refuses To Sign An Administrative Transcript And Never Returns To Work.

Alton Hill also served as the Union representative at an administrative hearing involving Clover English that was held on March 12, 2012. (Tr. 170, 181) The purpose of this administrative hearing was to gather the facts relating to an incident on March 9, when English slammed a door on his supervisor. English slammed the door so loudly that it made a noise that sounded like a gunshot, alarming Murtis Taylor clients and employees. (Tr. 393-394, 417-419, 686-688) At the conclusion of the administrative hearing, Clover English was presented with a transcript of the hearing to review and sign. Alton Hill testified that this transcript was a close approximation of what was said during the hearing. (Tr. 328, 365) William Newsome told English that he could make changes to the transcript and that he could take additional time to review it. (Tr. 175, 178-179, 367, 617, 671, 694-695, 768) English chose not to make any changes to the transcript but refused to sign, and he never returned to work. (Tr. 226-228)

Murtis Taylor has always required employees to tell the truth during administrative hearings and requiring employees to sign the administrative transcript, after being given the opportunity to make changes, is intended to ensure that employees tell the truth during administrative hearings. (Tr. 561-565) Article 3.0 of the Collective Bargaining Agreement provides that "The Employer also has the right to make and alter from time to time reasonable rules and regulations, not inconsistent with this Agreement, to be observed by employees." (R. Exh. 19)

II. QUESTIONS PRESENTED

1) Whether Alton Hill's conduct during Christine Zeh's administrative proceeding caused him to forfeit the Act's protection? (Exception One)

- 2) Whether Murtis Taylor was motivated by anti-union animus in the actions it took regarding Alton Hill? (Exception Two)
- 3) Whether Murtis Taylor discriminated against Alton Hill in violation of Section 8(a)(3) and (1) by suspending him for ten days? (Exception Three)
- 4) Whether Murtis Taylor violated Section 8(a)(1) by investigating Alton Hill for Medicaid fraud, searching his office, requiring him to confirm his immigration status and provide proof of automobile insurance, and by restricting his access to facilities at which he was not working? (Exceptions Four, Five, Six and Seven)
- 5) Whether the collective bargaining agreement gave Murtis Taylor the right to require employees to sign the transcript of administrative hearings? (Exception Eight)
- 6) Whether Murtis Taylor violated Section 8(a)(5) and (1) by unilaterally implementing the policy of requiring employees to sign the transcripts of administrative hearings? (Exception Nine)
- 7) Whether Murtis Taylor violated Section 8(a)(5) and (1) and Section 8(a)(3) and (1) by discharging Clover English for refusing to sign the transcript of the administrative hearing conducted on March 12, 2012? (Exception Ten)
- 8) Whether the Administrative Law Judge had authority to issue his decision when the National Labor Relations Board lacked a quorum? (Exception Twelve)

III. LAW AND ARGUMENT

A. Alton Hill's Conduct During The Christine Zeh Administrative Hearing Caused Him To Lose The Protection Of The Act.

The Administrative Law Judge concluded that Murtis Taylor violated Section 8(a)(3) and (1) by suspending Hill for ten days because he concluded that "Hill was engaging in protected activity by serving as Zeh's union representative, and because Hill did not, in the course of that protected activity, engage in conduct that caused him to forfeit the Act's protection." (ALJ Dec. 11) This conclusion was erroneous.

The evidence presented at the hearing showed that Hill was disruptive during the Zeh administrative hearing. It also showed that Hill repeatedly instructed Zeh not to answer the

questions put to her. (Tr. 339, 657-658, 682-684, 735, 740-741) Even Hill testified that he repeatedly instructed Zeh to "hold up" in answering questions and that his discussion with Newsome during the Zeh hearing was "intense." (Tr. 301-302) Hill also admitted that he impeded at least part of the investigation. (Tr. 339) As a result, Hill's conduct was not protected by Weingarten. See, e.g., New Jersey Bell Tel. Co., 308 NLRB 277, 280 ("Consequently, the representative cannot preclude the employer from using this technique. If he does so, as Huber did in this case, he loses whatever protection the Act affords a Weingarten representative"); Yellow Freight, 317 NLRB 115, 124 (1995) (Weingarten representative "lost the protection of the Act" by interfering with employer's ability to conduct an investigation); Mead Corp., 331 NLRB 509, 516 (2002) (Weingarten representative lost the protection of the Act by disrupting employer's ability to conduct investigation); Manville Forest Products Corp., 269 NLRB 390 (1984). A Union Representative in a Weingarten hearing is simply not permitted to instruct the employee not to respond to the employer's questions. That's what Hill did (among other disruptive tactics) and the result was a complete failure of the interview – such conduct was not protected by Weingarten. As the Board noted in New Jersey Bell, the Supreme Court in Weingarten "specifically declared that the presence of the representative should not transform the interview into an adversary contest or a collective bargaining confrontation, and that the exercise of the Weingarten right must not interfere with legitimate employer prerogatives." 308 NLRB at 279.

The Administrative Law Judge relied on *Fresenius USA Mfg.*, 358 NLRB No. 138 (2012) and *Atlantic Steel Co.*, 245 NLRB 814 (1979) in concluding that Hill did not forfeit the protection of the Act by his conduct. (ALJ Dec. at 11-12) Neither of these decisions,

however, concerned the scope of a union representative's rights under *Weingarten*, which is the issue here. *See, e.g., Mead Corp., supra*, 331 NLRB at 514 ("the permissible limits of a Union official's behavior in a *Weingarten* meeting are appreciably narrower than in many circumstances involving protected activity.") Hill's conduct was clearly outside the bounds of what is protected under *Weingarten* and Murtis Taylor was free to discipline Hill for that conduct.

B. Murtis Taylor's Actions Concerning Alton Hill Were Not Motivated By Anti-Union Animus.

Central to the Administrative Law Judge's decision that Murtis Taylor had violated Section 8(a)(3) and (1) by its treatment of Hill was his conclusion that Murtis Taylor was motivated by anti-union animus. In reaching this conclusion, the Administrative Law Judge relied heavily on the fact that "Newsome admitted that the Respondent took the actions it did against Hill to 'send a message to Mr. Hill as well as any other representatives." (ALJ Dec. at 14) The Administrative Law Judge relied on this evidence in concluding that Murtis Taylor had violated Section 8(a)(3) and (1) by suspending Hill and also in concluding that Murtis Taylor had violated Section 8(a)(1) by investigating Hill for Medicaid fraud and searching his work area, in requesting that Hill provide information required by Form I-9, in requesting that Hill verify that he had automobile insurance, and in restricting Hill's access to other Murtis Taylor facilities. (ALJ Dec. at 14, 15, 17, 18, 19) Thus, the Administrative Law Judge relied on this evidence to support *all* his findings against Murtis Taylor with regard to Alton Hill.

However, the quote relied on by the Administrative Law Judge does not demonstrate anti-union animus. William Newsome actually said that "we wanted to send a message to Mr. Hill as well as any other Union representatives that . . . [when] we are . . . conducting an

an administrative investigation that the type of behavior would not be allowed, would not be permitted, but put them also on record that they understand that the gravity of such could ultimately, could lead to discharge." (Tr. 750) As discussed earlier, Hill was not engaging in protected activity when he repeatedly directed Zeh not to answer questions during an administrative hearing and Murtis Taylor was not obligated to tolerate such conduct. The Administrative Law Judge's "editing" of what Mr. Newsome actually said is improper. It was perfectly proper for Murtis Taylor to send a message to Hill that unprotected conduct would not be tolerated. The Administrative Law Judge's incorrect and misleading editing of the actual testimony taints all of the findings on the peripheral actions he found to be 8(a)(1) violations. Murtis Taylor was not motivated by anti-union animus and it did not violate Section 8(a)(3) and (1) by its treatment of Hill.

C. Murtis Taylor Had The Right To Make And Alter Reasonable Rules And Regulations.

In order to find that Murtis Taylor violated Section 8(a)(5) and (1) and 8(a)(3) and (1) by discharging Clover English for refusing to sign an administrative hearing transcript, the Administrative Law Judge first had to find that Murtis Taylor did not have the right, under the collective bargaining agreement, to promulgate such a rule. (ALJ Dec. at 31-32)

However, the collective bargaining agreement clearly gave Murtis Taylor the right to require employees to sign the transcript of an administrative hearing. Article 3.0 of the collective bargaining agreement provides that "The Employer also has the right to make and alter from time to time reasonable rules and regulations, not inconsistent with this Agreement, to be observed by employees." (R. Exh. 19) By agreeing to this specific language, the Union waived the right to bargain over reasonable rules and regulations that Murtis Taylor chose to make or alter. See, e.g., The Budd Co., 348 NLRB 1223, 1224 (2006)

(collective bargaining agreement that provided that "The Company shall continue to have and exercise the right to make and enforce rules and regulations to ensure orderly and efficient operations, to maintain discipline, and to provide for the safety of associates and equipment" gave employer the right to implement a rule banning radios in the workplace without negotiating with the union.)

The Administrative Law Judge found that this provision did not allow Murtis Taylor to require employees to sign administrative transcripts because Article 20.1 of the collective bargaining agreement provides that "All new or revised policies and procedures relating to bargaining unit employees shall be distributed to the Executive Board Members no less than 30 days prior to implementation whenever possible." (R. Exh. 19; ALJ Dec. at 32) The Administrative Law Judge further found that Murtis Taylor "does not claim that it complied with the contractual notice provision before imposing the policy regarding the signing of interrogation notes and based on Hill's testimony and the record as a whole, I find that it did not do so." (ALJ Dec. at 32)

However, the Administrative Law Judge cited no authority to support the proposition that failure to comply with what he termed a "contractual notice provision" violates the authority conferred on an employer to promulgate work rules. By agreeing to Article 3.0, the Union waived its right to bargain over Murtis Taylor's decision to make or alter work rules. Article 20.1 did not entitle the Union to bargain over such work rules, and Murtis Taylor's failure to provide 30 days advance notice to the Executive Committee would constitute, at most, a violation of the collective bargaining agreement. It is well established, however, that a violation of a collective bargaining agreement does not necessarily constitute a violation of the Act. Indeed, the record does not disclose that the Union even filed a grievance over

Murtis Taylor's purported violation of Article 20.1. Since Murtis Taylor had the right under the collective bargaining agreement to require employees to sign administrative transcripts, Murtis Taylor did not violate Section 8(a)(5) and (1) when it required Clover English to sign an administrative transcript and it did not violate Section 8(a)(5) and (1) and Section 8(a)(3) and (1) when English's employment ended after he failed to sign the administrative transcript.

D. The Requirement That Employees Sign Administrative Transcripts Did Not Represent A Material, Substantial, And Significant Change To A Term or Condition of Employment.

Even if the collective bargaining agreement did not give Murtis Taylor the right to make and alter reasonable work rules, the requirement that employees sign administrative transcripts would not represent a violation of Section 8(a)(5) and (1). In concluding that Murtis Taylor had violated the Act by requiring employees to sign administrative transcripts, the Administrative Law Judge concluded that this requirement represented a "material, substantial, and significant" change to a term and condition of employment. (ALJ Dec. at In fact, Murtis Taylor had always required employees to tell the truth during 32) administrative hearings, and the signing requirement was simply intended to ensure that employees did what they were already required to do. (Tr. 561-565) In similar circumstances, the National Labor Relations Board has approved signing requirements imposed by employers. See, e.g., Pan Am Grain Co., 343 NLRB 318, 331 (2004) enfd. in relevant part, 432 F. 3d 69 (1st Circ. 2005) (requirement that employees sign overtime schedules did not represent a substantial change to a term or condition of employment where it represented an extension of past practice); Goren Printing, 280 NLRB 1120 (1986) (requirement that employees provide written notice of leaving early did not represent a substantial change to a term and condition of employment where it represented an extension of a past practice). Since the signing requirement did not significantly alter any terms or condition of employment, Murtis Taylor did not violate Section 8(a)(5) and (1) by implementing the requirement, or Section 8(a)(5) and (1) and Section 8(a)(3) and (1) by terminating Clover English's employment after he failed to sign an administrative transcript (even if Mr. English is found to have been terminated).

The Administrative Law Judge cited Garney Morris, Inc., 313 NLRB 101 (1993), Brimar Corp., 334 NLRB 1035 (2011), and Frontier Hotel & Casino, 323 NLRB 815 (1997) to support his conclusion that Murtis Taylor's requirement that employees sign administrative transcripts represented a substantial change to a term and condition of employment. (ALJ Dec. at 32-33) However, these cases are readily distinguishable. In none of these cases did the signing requirement at issue build upon an existing practice. In addition, none of the collective bargaining agreements at issue authorized the employer to impose a signing requirement. Indeed, in Frontier Hotel & Casino the Board found that the signing requirement arguably violated the contract. 323 NLRB at 818, n. 12. The Board found in Frontier Hotel & Casino that the reason for the signing requirement was baseless and part of a larger anti-union campaign, and there also was evidence that anti-union animus motivated the signing requirement in Garney Morris. 323 NLRB at 817-818; 1992 NLRB LEXIS 1303 **79-80. By contrast, there was no evidence that anti-union animus played any role in Murtis Taylor's requiring employees to sign administrative transcripts. Requiring employees to sign administrative transcripts did not represent a significant change to a term and condition of employment, and Murtis Taylor was free to require Clover English to sign the administrative transcript.

E. The National Labor Relations Board Lacks A Quorum.

Finally, the Administrative Law Judge's decision should be vacated because, at the time it was issued, the National Labor Relations Board had only one lawfully appointed member and therefore lacked a quorum. Noel Canning v. NLRB, 705 F. 3d 490 (D.C. Cir. 2013); cert. granted, 81 U.S.L.W. 3702 (U.S. June 24, 2013); NLRB v. New Vista Nursing & Rehab., F. 3d , 2013 U.S. App. LEXIS 9860 (3rd Cir. May 16, 2013). In addition, the Board lacked a quorum when the Acting Regional Director of Region Eight filed the Amended Consolidated Complaint and Notice of Hearing in this matter on October Even if it is argued that the actions of the Administrative Law Judge and the 29, 2012. Acting Regional Director did not represent actions arising out of the delegation of power by the Board, the Board issued an order on May 21, 2013 transferring jurisdiction from the Administrative Law Judge to the Board. There was only a single duly appointed Member at this time. Absent this order by the Board, the Administrative Law Judge's decision could 29 CFR Sec. 101.11(b). For all these reasons the Administrative Law have no effect. Judge's decision is void.

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully requests the National Labor Relations Board to grant its Exceptions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that service of the above and foregoing RESPONDENT'S BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS has been made on Region 8 of the National Labor Relations Board via the Agency's e-filing portal, and copies have been sent via regular U.S. Mail and email to the following:

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Dated this 6th day of July 2013.

One of the Attorneys for Respondent Murtis Taylor Human Services System